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IN THE

Supreme Court of the United States

No. 71-128

AVM CORPORATION,

Petitioner,

v.

DATAMEDIA COMPUTER SERVICE, INC.,

Respondent.

PETITION OF AVM CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No.

AVM CORPORATION,

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v.

DATAMEDIA COMPUTER SERVICE, INC.,

Respondent.

PETITION OF AVM CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, AVM Corporation, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in the above styled cause which reversed the judgment of the United States District Court for the Northern District of Texas (which Court dismissed this suit for lack of venue) and remanded the case for trial on the merits.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported and is attached hereto as Appendix "A" along with the order of that Court denying the Petition for Rehearing. The judgment of the District Court is attached hereto as Appendix "B."

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 19, 1971. A timely Petition for Rehearing was denied on May 18, 1971. This Petition for Certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner, AVM Corporation, was "transacting business" in the Northern District of Texas within the meaning of Section 12 of the Clayton Act (15 U.S.C.A. Sec. 22) or 28 U.S.C.A. Sec. 1391.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein, along with the pertinent part of each insofar as this case is concerned, are the following:

Clayton Act, Section 12—15 U.S.C.A., Section 22:

> "Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; . . ."

28 U.S.C.A., Section 1391:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

STATEMENT OF FACTS

Datamedia Computer Service, Inc. (Respondent) was incorporated in Texas on October 28, 1968. (Respondent here was Plaintiff in the District Court. It is not to be confused with the predecessor company, Datamedia Corporation, a New York corporation.) AVM Corporation (Petitioner AVM) is a Delaware corporation with its principal place of business in Jamestown, New York.

None of the acts alleged to have been committed by Petitioner in violation of the antitrust laws of the United States are alleged to have occurred *after* the date of incorporation of Datamedia on October 28, 1968. Respondent claims the right to maintain this action for certain acts which are alleged to have occurred *prior* to the incorporation of Respondent, it being the contention of Respondent that on October 31, 1968 it acquired assets (including a contract with Dallas County) of Datamedia Corporation, a New York corporation, whose principal office and place of business is located in Binghampton, New York.

Petitioner has never had and does not now have an office or place of business in the Northern District of Texas nor any employee or agent residing therein (with one minor exception referred to in the opinion of the United States Court of Appeals).

Petitioner AVM has made *no* sales in the Northern District of Texas since 1964, except for one isolated sale in such District, the same being of a used voting machine for a total consideration of $1,500. Petitioner's total sales volume in 1968 was $9,600,000.

Except for the one sale mentioned, there has been no activity by Petitioner AVM in the Northern District of Texas since 1964 other than occasional solicitation in such District by Petitioner's non-resident personnel and maintenance of voting machines sold in earlier years. Petitioner did submit an unsuccessful bid to Dallas County in 1968 for the sale of a substantial number of voting machines and Petitioner AVM's manager for the Southwest Region solicited sales in the forum District during the years 1967 and 1968. Other agents or representatives of Petitioner AVM likewise solicited sales in the forum District during 1967 and 1968. A representative of Petitioner AVM did appear on two occasions before the Dallas County Commissioners' Court in the 1967-1968 period, recommending Petitioner's machines to the Court.

Respondent Datamedia filed this antitrust action against Petitioner and one other party in the Northern District of Texas and venue was challenged under Section 12 of the Clayton Act (15 U.S.C.A. Sec. 22) and 28 U.S.C.A. Sec. 1391. The District Court appointed a special master to supervise the discovery of venue facts. Upon completion of discovery proceedings, a hearing was held and Respondent's complaint was dismissed for lack of venue. It was the Order dismissing the case which was reversed and remanded by the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

The record clearly indicates that Petitioner AVM was *not* transacting business in the Northern District of Texas at the time the action was filed or at the time the injury to Respondent is alleged to have occurred. The burden of proof is on the Respondent (Datamedia) to prove the facts which will support venue when the allegations made by Respondent are challenged. *Calagaz v. Calhoon*, 309 F.2d 248, 255 (5th Cir. 1962); *Rhode Island Fittings Co. v. Grinnell Corp.*, 215 F. Supp. 198, 200 (D. R. I. 1963).

In its order of dismissal, the District Court outlined the facts upon which it based its conclusion that Petitioner AVM was not transacting business in the forum District within the meaning of 15 U.S.C.A Sec. 22 at the time this action was filed or at the time of the occurrence of the injuries which Respondent allegedly suffered. It is admitted that in the five years following 1964 (and prior to the filing of the instant case) Petitioner had made only one sale (for $1,500) in the forum District out of total sales ranging annually from $4,900,000 to $9,600,000.

Respondent asked the District Court to consider sales *prior* to the year 1964 but it was concluded that such sales were made by a completely different entity. Petitioner AVM in 1964 acquired the voting machine business of a predecessor and AVM is a publicly held corporation having no connection with the predecessor. The only question here is whether Petitioner was transacting business in the Northern District of Texas either when the action was filed or when the alleged injury occurred. Based upon the facts set forth above, it is respectfully submitted that Petitioner AVM was *not* transacting business in such District at the times relevant hereto and that the finding to this effect is absolutely accurate.

The language in 15 U.S.C.A. Sec. 22 is to the effect that "'. . . any suit under the antitrust laws against a corporation may be brought in any district wherein it *transacts* business. . . ." (Emphasis added.) It is to be noted that this language speaks in the *present* tense and refers to the transaction of business at the time of filing suit. Barron & Holtzoff, *Federal Practice and Procedure,* 1969 Pocket Part, Sec. 80, p. 282; *City of Philadelphia v. Morton Salt Co.,* 248 F. Supp. 506 (E.D. Pa. 1965); *Gem Corrugated Box Corp. v. Mead Corp.,* 189 F. Supp. 584 (S.D.N.Y. 1960). The case of *Stern Fish Co. v. Century Seafoods, Inc.,* 254 F. Supp. 151 (E.D. Pa. 1966), is especially relevant to our fact situation. Defendant there had not transacted business within the state for three years prior to the filing of suit

but had, during that time, sent employees there in connection with an advertising campaign. It was held that such activity did not constitute transacting business. Similarly, the occasional trips by AVM representatives into the District, the sale of one machine in 1968 and the attempt in 1968 to sell or lease other machines to Dallas County do not add up to the transaction of business.

If the date of filing suit is not the appropriate date to consider and, instead, the critical time is when the alleged injury occurred, it is still clear that venue in the instant case does not lie in the chosen District. Respondent did not exist until October 28, 1968 and it was not possible to commit an injury against this Respondent prior to its birth. Respondent, in fact, was formed more than four years *after* AVM made a sale of any consequence in the forum District.

The complaint filed herein has to do with earlier alleged conduct of Petitioner AVM which supposedly affected Datamedia Corporation, a New York corporation, *completely unconnected* with Plaintiff in this suit. There is no language in the complaint which in any way connects the alleged injury (which would have occurred to the earlier Datamedia Corporation) to the Respondent Datamedia. Respondent relies upon the Purchase Agreement of October 31, 1968 to try to bridge this important gap and such Agreement appears in the original record sent to the Court of Appeals. *There is nothing in such Purchase Agreement that constitutes an assignment of any cause of action by the former New York Datamedia Corporation to Datamedia, Respondent herein.* No assignment appears in the record. The New York Datamedia Corporation is not a party to this suit. Final judgment in this suit would not be res judicata as to the New York Datamedia Corporation. The fact is that Datamedia, Respondent, is limited to a cause of action for acts occurring *after* its incorporation on October 28, 1968.

With reference to whether or not Petitioner AVM was transacting business in the Northern District of Texas, the facts are practically the same whether one considers the birth

date of Respondent, October 28, 1968, or the date this suit was filed, March 14, 1969.

Petitioner acknowledges that while the sales figures referred to are helpful to the position it takes, these alone are not controlling in deciding whether a corporation is transacting business in a given district. The true test is whether the party transacts business *of a substantial character* in the district. As stated in *United States v. Scophony Corp.*, 333 U.S. 795, 68 S.Ct. 855 (1948), "The practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' " is the test of venue. To quote a leading case cited by Respondent, "One thing at least which does emerge from the post-*Scophony* cases . . . is a substantiality requirement in terms of the volume of trade done." *B. J. Semel Associates, Inc. v. United Fireworks Mfg. Co.*, 335 F.2d 827, 832 (D.C. Cir. 1965). Thus, volume of business is an essential element of the substantiality test, and a sale of $1,500 in 1968 does not seem substantial when compared with a total sales volume of $9,600,000 in 1968.

The Court of Appeals commented on the fact that the largest volume of sales by Petitioner AVM occurred in Presidential election years and that the voting machine business is unusual because most sales are made only every two years with the largest volume being attained every four years. That Court also pointed out that in the industry involved here, solicitation is an essential element of the business.

While all this is true, the application of that principle to the facts at hand still is not sufficient to show that Petitioner was transacting business in the Northern District of Texas. For example, 1968 was a Presidential election year. Sales by Petitioner in the District during that year were insignificant and insubstantial. In the second year following the preceding Presidential year of 1964, being the year 1966, there were *no* sales in the District by Petitioner.

Insofar as solicitation is concerned, the evidence indicated that employees of AVM spent a total of eighty-one man days in Dallas in 1967 to 1968, being primarily the Southwest Regional Manager of AVM (who resides in Oklahoma), who solicits sales in Texas and other states. A Dallas attorney representing AVM appeared before the Dallas County Commissioners' Court once in 1967 and again in 1968. Dallas County employees are occasionally trained in New York to operate AVM's machines.

It is respectfully submitted that these activities do not amount to the transaction of business in the Northern District of Texas.

In *Philadelphia Hous. Auth. v. American Radiator & S. San. Corp.*, 291 F. Supp. 252 (E.D. Pa. 1968), a vice president of defendant corporation attended a convention in Philadelphia in one year in question, and the company advertised in three trade publications distributed in the district; in addition annual sales of from $925 to $3,295 were made there over a four year period. The court said at p. 256:

> "If Georgia Sanitary carries on any business of a substantial character in this District, it does not do so by virtue of such isolated occurrences as its vice president's journey to Philadelphia, nor by its advertising in three trade journals that happen to be distributed in that District."

Nor were the sales considered substantial by the court. See also *Stern Fish Co. v. Century Seafoods, Inc.*, supra, in which a defendant who sent officers and employees into the district at "infrequent intervals" in connection with an advertising campaign, was held not to be transacting business for venue purposes in the district.

The decisive factor in the authorities on this subject is not solicitation, or advertising or servicing of products but the substantiality of sales. See *Lippa & Co. v. Lenox, Inc.*, 305 F.Supp. 175 (D. Vt. 1968); *B.J. Semel Associates, Inc. v. United Fireworks Mfg. Co.*, supra.

Venue does not lie in the Northern District of Texas under 28 U.S.C.A. Sec. 1391. For one thing, the general venue provisions in the above statute do not apply to antitrust suits and there is an established body of law holding that 15 U.S.C.A. Sec. 22 provides an exclusive venue for such litigation. *Goldlawr v. Shubert,* 169 F. Supp. 677, 680 (E.D. Pa. 1958); *R.J. Coulter Funeral Home v. National Burial Ins. Co.*, 192 F.Supp. 522, 523 (E.D. Tenn. 1960).

Even if the general venue statute would be considered applicable to antitrust suits, the same would not apply in the case at bar because the claim here did not arise in the Northern District of Texas within the meaning of 28 U.S.C.A. Sec. 1391.

Respondent argued below that Section 1391(b) covered the facts in this case and he relied upon the language in the statute that "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought . . . in the judicial district . . . in which the claim arose . . . ."

Respondent took the position that its claim allegedly arose in the Northern District of Texas. A similar argument was rejected in *Philadelphia Hous. Auth. v. American Radiator & S. San. Corp.*, supra, at pp. 260, 261:

> "While it may be well to find that a tort claim arises in the jurisdiction where the injury occurs, antitrust actions are not susceptible to such simplistic rationale . . . .
>
> * * * * *
>
> "In general, venue affords some protection to a defendant from being forced to litigate an action in a district remote from his residence. 1 Moore's Federal Practice Para. 0.140, 1317 (1964). Venue relates to the *convenience* of litigants. If courts were to adopt the mechanical test of 'place of injury' determining 'where the claim arose,' the sale of one small item to a plaintiff at a price illegally inflated by an alleged conspiracy in some remote district would create venue there. This, it is sub-

> mitted, would undermine the principles underlying the concept of federal venue and negate any compatible reading of Sec. 1391(b) with Sec. 12 of the Clayton Act . . . .
>
> * * * * *
>
> "It is submitted that 'where the claim arose' should be dependent upon where the contacts weigh most heavily. A 'weight of the contacts' test would enable venue to exist in a district where the injury occurred, if significant sales causing substantial injury were made to plaintiffs there by defendants."

Even if the district where the injury occurred is taken to be the district "in which the claim arose," Respondent still fails to establish venue in the Northern District of Texas for if Respondent has suffered any injury, *how could it have occurred before its incorporation on October 28, 1968?* The complaint filed below alleges no conduct by Petitioner AVM occurring after the above date except for an appearance by a representative of Petitioner before the Dallas County Commissioners' Court on November 25, 1968, in connection with a contract of the New York Datamedia Corporation, and a suit filed in Dallas County but not alleged to have been filed by Petitioner AVM. The Respondents specifically pleaded that the opposition of Petitioner AVM at the Commissioners' Court hearing failed to prevent payment being made under the County's contract with the New York corporation, and further pleaded that the lawsuit referred to, involving strangers to all the parties here, failed to prevent payment of Dallas County funds under the above contract. There is not one word in the Complaint which even attempts to connect Petitioner AVM with *any injury* to Respondent, Datamedia, as distinguished from the New York corporation, Datamedia Corporation. The latter is not a party to this litigation. It can hardly be argued that the Northern District of Texas is the district where the injury occurred.

CONCLUSION

Petitioner AVM respectfully submits that venue does not lie in this case in the Northern District of Texas either under the provisions of 15 U.S.C.A. Sec. 22 or 28 U.S.C.A. Sec. 1391. The decision of the District Court dismissing this suit for lack of venue was proper. It is respectfully urged that the decision of the Court of Appeals is contrary to well established decisions of the Supreme Court and of many Courts of Appeal. For these reasons, Petitioner AVM respectfully requests that this Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30283

DATAMEDIA COMPUTER SERVICE, INC.,
Plaintiff-Appellant,

versus

AVM CORPORATION and SHOUP VOTING MACHINE CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(April 19, 1971)

Before COLEMAN, SIMPSON, and RONEY, Circuit Judges.

COLEMAN, Circuit Judge: In the District Court for the Northern District of Texas Datamedia Computer Service, Inc. filed a Sherman Anti-Trust Act suit against two competing voting machine companies, AVM Corporation and Shoup Voting Machine Corporation.

The venue was challenged, Section 12[1] of the Clayton Act and 28 U.S.C. Section 1391.[2] The District Court appointed a special master to supervise the discovery of venue facts. Upon completion of discovery proceedings, a hearing was held and the complaint was dismissed for lack of venue. Datamedia appeals. We reverse, and remand the case for trial on the merits.

I

The Law

Section 12 of the Clayton Act confers venue for antitrust suits upon any district in which the defendant corporation is transacting business.

The test for transacting business under Section 12

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[1] 15 U.S.C.A., §22. District in which to sue corporation.

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

[2] 28 U.S.C.A., § 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

was set forth in *Eastman-Kodak Company v. Southern Photo Materials*, 1927, 273 U.S. 359, 47 S.Ct. 400, 71 L. Ed. 684. The Court stated "that a corporation is engaged in transacting business in a district . . . if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." This decision effectively broadened the venue of the district court in anti-trust suits.

It is best demonstrated by the Court itself in *United States v. Scophony Corporation*, 1948, 333 U.S. 795, 68 S.Ct. 855, 92 L.Ed. 1091;

> "Thus by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the 'found' — 'present' — 'carrying-on-business' sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the anti-trust laws from the often insuperable obstacle of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due."

In *Jeffrey-Nichols Motor Company v. Hupp Motor Car Corporation*, 1 Cir., 1931, 46 F.2d 623, Hupp had district managers who promoted and solicited sales

in much the same manner as AVM's agents. The Court had this to say about transacting business:

> "Under the rule laid down in the Eastman Company case, while a single transaction of business may not be sufficient to establish a venue in a district, it does not require the maintenance of an office or place of business or the presence of agents soliciting or taking orders. . . . The sale of goods is not essential to constitute transacting business. All the steps leading up to or in promoting sales may constitute the transaction of business."

In *Green v. United States Chewing Gum Mfg. Company*, 5 Cir., 1955, 224 F.2d 369, we held:

> "It will not do to deny substantiality by replying, as said defendant does in its President's affidavit, that '. . . the gross business of United States Chewing Gum Mfg. . . . represented by shipments to these two companies . . . is a very small part of the total business of my company', for if that were the rule, we would have different tests of substantiality applying to different corporations according to their size; a large corporation could, with impunity, engage in the same acts which would subject a smaller corporation to jurisdiction and venue. We agree with Judge Allan K. Grim of the Eastern District of Pennsylvania that the test is rather, whether or not the sales would appear to be substantial from the average

businessman's point of view? Sunbury Wire Rope Manufacturing Company v. United States Steel Corporation, E.D. Pa., 1955, 129 F.Supp. 425, 427."

II

The Facts

A. AVM

AVM is a Delaware Corporation with its principal place of business in Jamestown, New York. It maintains no office or place of business in the Northern District of Texas, nor does it have any employee or agent residing in the district. AVM Corporation and its predecessors have been in the voting machine business since 1895. It is the largest producer of voting machines in this Country. It existed as Automatic Voting Machine Corporation from 1925 to 1958, when it was acquired by Rockwell Manufacturing Company. AVM was operated as a division of Rockwell until 1964, when it became a separate entity as a Rockwell spin-off.

Since 1936 AVM, or its direct predecessors, have made numerous sales of voting machines in the Northern District of Texas. M. O. Doolittle, Executive Vice-President of AVM, admitted in deposition that AVM, or its predecessors, sold within the forum district forty-four voting machines in 1936, one hundred twenty machines in 1940, one hundred fifty machines in 1946, seventy-five machines in 1952, seventy-five machines in

1960, and one hundred voting machines in 1963. As indicated by the dates the sales have generally occurred in Presidential election years or in the so-called "off-year" elections. The largest volume of sales has occurred in the Presidential election years.

AVM's sales in the forum district declined after the Presidential election year of 1964. In this year AVM sold to Dallas County one hundred voting machines at a price of $179,200. Since that time AVM has sold within the forum district only one used voting machine for a price of $1500. In addition to this sale AVM submitted a bid to Dallas County for the sale of four hundred eighty six voting machines at a price of $1,019,628, less rental credit of $45,000. However, this bid was unsuccessful, since the contract was awarded to Datamedia Corporation on a bid of $260,400. Had AVM received the Dallas County award that sale would have represented approximately 10% of its gross sales of $9,600,000 for 1968.

Though AVM has made only one sale in the forum district since 1964, it has continued to solicit business in the area. The Corporation employed Bert Evans in 1967 as the Manager for the Southwest Region, which includes the forum district. His job was to solicit voting machine sales. During 1967 and 1968 Evans made 37 business trips to the forum district, which resulted in the sale of the used voting machine in 1968. Prior to this time Harold Green had been employed by AVM as a resident agent in the forum district in 1965 and 1966. He did not sell any voting machines, but received $33.00 commission for the machine Evans sold in 1968.

In the years 1967 and 1968 AVM's agents or representatives made 49 separate business trips for a total of 81 days to the Northern District of Texas. In addition to these trips Joseph M. Shelton appeared twice before the Dallas County Commissioner's Court. At these appearances he pointed out alleged shortcomings of Datamedia's machines and recommended AVM's machines to the Court.

Finally, AVM's Product Manager, A. V. Martin, makes at least one stop a year in Dallas County to check on any problems the County has with the machines. Pursuant to these problems AVM has conducted $3,226.17 worth of repair services from 1963 through 1967.

The above is the sum total of AVM's business activities within the Northern District of Texas. When analyzing these activities it must be remembered that the voting machine business is unusual in that most sales are made only every two years with the largest volume every four years. In such an industry solicitation is an essential element. It is readily apparent that AVM could not pop in on potential customers once every two or four years and hope to compete.

B. *Shoup*

Shoup Voting Machine Corporation and its predecessors have been engaged in the voting machine business since 1893. The Company was known as the Shoup Company and did not sell its first voting machine until

1927. In 1929 the Company was incorporated in New Jersey.

In 1931 or 1932 a new company incorporated in Delaware as the Shoup Voting Machine Corporation. This corporation acquired the voting machine rights from the Shoup Company for which they paid royalties for seventeen years. Shoup Voting Machine Corporation was taken over by different persons and reincorporated in New York in 1954. This lasted for two years until General Battery Corporation acquired Shoup in 1956. General Battery operated Shoup until 1965 when it was sold and incorporated in Pennsylvania as the Shoup Voting Machine Company. This is its present status.

Shoup began its business activities in the forum district in 1963. In this year Shoup submitted to Potter County a bid to provide eighty to one hundred ten voting machines at $1,723 each. In May, 1964, Shoup supplied Tarrant County with 430 voting machines for a one year rental of $21,500 on a lease-purchase agreement. It is undisputed that in 1965 Tarrant County exercised its purchase option and bought the machines for $691,440, less rental. Also, in August, 1964, Shoup supplied Tarrant County with twenty additional machines on the same lease-purchase agreement. Again it is undisputed that Tarrant County exercised their option in 1965 and purchased the machines for $32,160, less rental. Since 1965 the only sales made by Shoup in the forum district were $430 for parts in 1966, $430 for parts in 1967, and $4,635 for parts in 1968. However, in July, 1968, Shoup submitted to Tarrant County a bid for one hundred voting machines at a purchase

price of $1,823 per machine. This bid was unsuccessful.

Shoup retains Jim Dulaney Machinery Company of San Antonio as an independent sales representative. Dulaney has made no sales in the forum district. In 1968, Dulaney wrote letters to counties within the district, but these were not answered. Although it is clear that Shoup's agents or representatives made several trips to the forum district from 1964-1968, the exact number for each year is not ascertainable. Some of the trips claimed by the appellant in fact included trips made to other places outside of the Northern District of Texas.

In 1967, Ransom Shoup, an officer of Shoup Voting Machine Corporation, appeared before the Dallas County Commissioner's Court to attempt to sell Shoup machines to Dallas County at some future date. At this meeting he testified that Shoup could not submit a bid to Dallas County because it did not manufacture a large enough machine.

III

The Decision

We are here dealing with an industry which, by its very nature, makes sales, and can expect to make sales, only at intervals, governed largely by the periodical nature of the electrical process. Between times it must remain active to secure business as it arises. Thus the facts must be evaluated in that context.

Appellees contend that the decision of the District Court rested upon its findings of fact, hence the finding that AVM and Shoup were not transacting business in the district when the suit was filed is entitled to shelter of the "clearly erroneous" umbrella. *Hilliard v. C.I.R.*, 5 Cir., 1960, 281 F.2d 279, does not support this view. We there held:

> "This Court is, of course, freed from the clearly erroneous rule where there is no conflict as to the evidence and the question becomes one as to the legal inferences to be drawn from undisputed facts."

From the facts hereinabove enumerated we are entirely persuaded that this case falls within the teachings of *Jeffrey-Nichols, supra,* and *United States Chewing Gum, supra.* It necessarily follows, in our opinion, that both appellees were transacting business in the Northern District of Texas within the meaning and purport of Section 12 of the Clayton Act at the time this suit was filed.

Accordingly, the judgment of the District Court is reversed and the case remanded for trial on the merits.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

DATAMEDIA COMPUTER SERVICES, INC.	)	
	)	
v.	)	Civil Action No.
	)	3-3062-A
AVM CORPORATION and	)	
SHOUP VOTING MACHINE CORPORATION	)	
	)	

ORDER OF DISMISSAL

At a pretrial conference held on July 19, 1970, came on for determination the motions of the defendants, AVM Corporation and Shoup Voting Machine Corporation, to dismiss this action because venue is not properly laid in the Northern District of Texas; and the Court, having duly considered the pleadings, the evidence, and the briefs and argument of counsel, finds as follows:

1) Plaintiff, Datamedia Computer Service, Inc. (hereinafter "Datamedia-Texas"), was incorporated under the laws of Texas on October 28, 1968.

2) Defendant AVM Corporation (hereinafter "AVM") is a Delaware Corporation with its principal place of business in Jamestown, New York.

3) Defendant Shoup Voting Machine Corporation (hereinafter "Shoup") is a Pennsylvania corporation with its principal place of business in Bala Cynwyd, Pennsylvania.

4) Plaintiff Datamedia-Texas' counsel and lawyers associated with him are the incorporators, directors and stockholders of Datamedia-Texas.

5) None of the acts alleged to have been committed by defendants in violation of the antitrust laws of the United States appear to have occurred after the date of incorporation of plaintiff, Datamedia-Texas, on October 28, 1968.

6) Plaintiff, Datamedia-Texas, claims the right to maintain this action for alleged antitrust acts of defendants prior to incorporation of plaintiff on October 28, 1968, under a Purchase Agreement, dated October 31, 1968, whereby it acquired assets of a New York Corporation, Datamedia Corporation, having its principal office and place of business in Binghampton, New York.

7) Neither defendant AVM nor defendant Shoup maintains an office or place of business in the Northern District of Texas, nor does either have any employee or agent residing in this district; and, so far as the evidence indicates, neither AVM nor Shoup ever has maintained an office or place of business in this district nor had any employee or agent residing in the Northern District of Texas.

8) AVM has made no substantial sales in the Northern District of Texas since 1964.

9) Since 1964, AVM has made only one isolated sale in this district, of a used voting machine, for a consideration of $1500.00, which sale occurred in 1968, whereas the total sales volume of AVM in that year was approximately $9,600,000.00.

10) Except for the sale referred to in the preceding finding, there has been no activity by AVM in the Northern District of Texas since 1964, except for occasional solicitation by personnel of AVM not resident in the Northern District of Texas and the maintenance of machines sold in previous years.

11) Shoup has made no substantial sales in the Northern District of Texas since 1965.

12) Since 1965, sales by Shoup in the Northern District of Texas have been of parts for voting machines amounting to $430.00 in 1966, $435.00 in 1967, and $4,635.00 in 1968; there were no sales by Shoup in this district in 1969. During the years in question the annual sales of Shoup ranged from in excess of $5,000,000.00 to more than $9,000,000.00.

13) Except for the sales of parts referred to in the preceding finding, there has been no activity by Shoup in the Northern District of Texas since 1965, except for occasional solicitation by personnel not resident in the Northern District of Texas.

14) Ransom F. Shoup, an officer of defendant Shoup, appeared before the Dallas County Commissioners in July, 1967, and testified on that occasion that Shoup could not submit bids to Dallas County because it did not manufacture voting machines of the size required by said county.

And it appearing to the Court that neither AVM nor Shoup was transacting business in the Northern District of Texas at the time this action was filed, or at the time the injury to plaintiff is alleged to have occurred, within the meaning of 15 U.S.C. 22, that neither of the defendants was doing business in Texas at such times, within the meaning of 28 U.S.C. 1391, that venue in this action is not conferred by any of the provisions of the general venue statutes, 28 U.S.C. 1391 et seq.; and it appearing that plaintiff, Datamedia-Texas, objected to transfer of this action in the interest of justice, under 28 U.S.C. 1406(a) or 1404(a), to the Western District of New York, in which it could have been brought, tendered alternatively by both defendants at the pretrial conference, it is, therefore,

ORDERED, ADJUDGED and DECREED that the motions of defendants, AVM and Shoup, to dismiss this action for lack of venue in the Northern District of Texas be and they hereby are granted and this action is dismissed; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the stipulated fees and expenses of the Special Master appointed herein in the sum of $1500.00 shall be taxed as costs, one half to be paid by plaintiffs and one half to be paid by defendants herein; upon entry of this Order.

SIGNED and ORDERED ENTERED this 20th day of June, 1970.

/s/ Joe E. Estes
CHIEF JUDGE
UNITED STATES DISTRICT COURT

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 12 1971
ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-95

SHOUP VOTING MACHINE CORPORATION,
Petitioner,

v.

DATAMEDIA COMPUTER SERVICE, INC.,
Respondent.

NO. 71-128

AVM CORPORATION,
Petitioner,

v.

DATAMEDIA COMPUTER SERVICE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

JAY M. VOGELSON
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Dallas, Texas 75201
Attorney for Respondent

In the

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AVM CORPORATION AND SHOUP VOTING MACHINE CORPORATION,

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Respondent, Datamedia Computer Service, Inc., prays that the Petitions for Writs of Certiorari filed by AVM Corporation ("AVM") and Shoup Voting Machine Corporation ("Shoup") be denied.

This case involves only a differing view of admitted venue facts which are fully stated in the opinion of the Court of Appeals. There is really no significant issue of law for this Court to consider. The Court of Appeals has not made a legal judgment inconsistent with decisions of this Court or in conflict with other Circuits.

The issue presented by Respondent to the Court of Appeals was:

> Whether a continuous period of sales of voting machines, service *and solicitation* within the Northern District of Texas by AVM, Shoup, and predecessor corporations of each, constitute "transacting business" under Clayton Act, Section 12. [Emphasis added].

The Court of Appeals merely held that the District Court erred in not considering the cyclical nature of sales in the voting machine business and the substantial, *continuing* sales solicitation activities of AVM and Shoup within the Northern District of Texas. As an example of AVM's sales solicitation activities that the District Court ignored, the Court of Appeals pointed out, 441 F. 2d at 607:

> AVM submitted a bid to Dallas County for the sale of four hundred eighty six voting machines at a price of $1,019,628, less rental credit of $45,000. However, this bid was unsuccessful, since the contract was awarded to Datamedia Corporation on a bid of $260,400. Had AVM received the Dallas County award that sale would have represented approximately 10% of its gross sales of $9,600,000 for 1968.

Numerous visits to county purchasing officials, bid submissions and related solicitation activities by AVM continue to this day.

As the Court of Appeals observed, 441 F. 2d at 607:

> When analyzing these activities, it must be remembered that the voting machine business is unusual in that most sales are made only every two years with the largest volume every four years. In such an industry solicitation is an essential element. It is readily apparent that AVM could not pop in on potential customers once every two or four years and hope to compete.

Shoup is in the same position as AVM although the duration of its business activities in the forum district is not as long as AVM's: From 1936 to 1968, Dallas exclusively used AVM voting machines (without competing bids from Shoup); Fort Worth has used Shoup voting machines since it discarded the exclusive use of paper ballots in 1964 (without competing bids from AVM).

Considering both the historic sales made in the forum district by AVM and Shoup and their substantial, continuing solicitation activities, the Court of Appeals properly held that AVM and Shoup are "transacting business" in the Northern District of Texas.

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *United States* v. *National City Lines*, 334 U.S. 583 (1947) and *United States* v. *Scophony Corp.*, 333 U.S. 795 (1948) articulate clear standards to guide lower courts in their consideration of venue issues in antitrust cases. This is but one of many, many venue cases that have followed *Scophony*. The lower courts have had no difficulty applying *Scophony* to varying factual circumstances. There is no need for the legal concepts involved to be again considered by this Court.

Respondent wishes to get on with the merits of the case which was brought to recover damages for injuries sustained by it, after its incorporation, occasioned by Petitioners unlawful efforts to preclude Respondent's entry into the voting machine industry.[1]

The Complaint was filed March 14, 1969. In July, 1969, the District Court limited discovery to venue facts and appointed a Special Master to take evidence. Venue discovery was directed to be completed by September 22, 1969, but the District Court did not hear the venue motions until June 19, 1970. This appeal resulted from the District Court's decision dismissing the case for lack of venue, a decision that the Court of Appeals quite rightly reversed.

Voters in Dallas who have used AVM voting machines continuously since 1936 and voters in Fort Worth who have used Shoup voting machines for several years would be amazed to learn that AVM and Shoup were not "transacting business" in the forum district. Those voters would agree with the Court of Appeals, 441 F. 2d at 608, that:

> . . . Both appellees were transacting business in the Northern District of Texas within the meaning and purpose of Section 12 of the Clayton Act *at the time this suit was filed.* [Emphasis added].

[1] AVM's Petition argues the facts extensively. It contends that Respondent seeks damages for injury suffered by another. That is not true. Besides, the case at this time should not be concerned with the merits, but with venue only.

Accordingly, Respondent urges that the Petitions for Writs of Certiorari filed by AVM and Shoup be denied.

Respectfully submitted,

Original Signed By
JAY M. VOGELSON

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Attorney for Respondent

CERTIFICATE OF SERVICE

I, JAY M. VOGELSON, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief of Respondent In Opposition on counsel for Petitioners, by depositing same in the United States mails, postage prepaid, on August 10, 1971, addressed to Mr. Morris I. Jaffe, 1000 LTV Tower, Dallas, Texas 75201, counsel for AVM; and Mr. Jerry L. Buchmeyer, 2300 Republic National Bank Building, Dallas, Texas 75201, counsel for Shoup.

Original Signed By
JAY M. VOGELSON

Jay M. Vogelson